IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-492

REV. CHARLES H. NEVETT, et al.,

Petitioners,

v.

LAWRENCE G. SIDES, etc., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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No. 78-_____

REV. CHARLES H. NEVETT; REV. JOHN A. Salary, and ERNEST McLIN, individually and on behalf of all those similarly situated,

Petitioners,

vs.

LAWRENCE G. SIDES, individually and in his capacity as Mayor of Fairfield, Alabama; GRADY ELLISON, individually and in his capacity as City Clerk of Fairfield, Alabama; and WILLIAM J. BAXLEY, individually and in his capacity as Attorney General of the State of Alabama; THE CITY OF FAIRFIELD, a municipal corporation; and JAMES H. SIMS, VERA BELL, BILL GILMORE, CARL H. KILGORE, JOHN E. PHILLIPS, HENRY HARDY, CHARLES A. WILLIAMS, GEORGE W. SCOREY, JR., JERRY F. MAPLES, T.S. SMITH, CLIFTON L. WOOD, JR., GORDON JONES and GRADY ALEXANDER as members of the Fairfield City Council and their official successors,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinions and judgments of the United States Court of Appeals entered in the above-styled cause on March 29, 1978 and June 8, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 571 F.2d 209 and is reproduced in the separately bound appendix at 1a. The

opinion of the United States District Court for the Northern District of Alabama was published as an appendix to the court of appeals opinion, reported at 571 F.2d 229, and is reproduced at 59a. The previous appeal in this cause, opinion rendered June 8, 1976, is reported at 533 F.2d 1361, and is reproduced at 90a. Likewise, the district court opinion there reviewed was published as an appendix to the court of appeals opinion, published at 533 F.2d 1366. It is reproduced at 103a.*

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 29, 1978. A timely petition for rehearing and suggestion for rehearing en banc was denied on May 25, 1978. By order of

*These four opinions will be referred to as follows:

Second court of appeals opinion--Nevett II
Second district court opinion --Nevett B
First court of appeals opinion --Nevett I
First district court opinion --Nevett A

Additionally, an unpublished order was entered on June 30, 1976, denying rehearing from Nevett I and also refusing to review the district court proceedings after remand. It is reproduced at 142a.

August 9, 1978, Justice Lewis F. Powell, Jr., extended the time for filing a petition for writ of certiorari to and including September 22, 1978. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section I of the Fourteenth Amendment of the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section I of the Fifteenth Amendment of the Constitution of the United States:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude--

The statute at issue is now codified as Ala.Code, §11-43-40 (1975).* It is reproduced in full

*Formerly Ala.Code. tit. 37, §426. It was recodified with editorial but no substantive changes. See, 3a, for former language.

beginning at 144a, but in pertinent part reads:

> (a) In cities having a population of 12,000 or more, the following officers shall be elected . . .:
>
> (1) In cities having seven wards or less, a president of the city council and two aldermen from each ward, to be elected by the qualified voters of the several wards voting separately in every ward; except, that in such cities having a population of less than 20,000 the two aldermen from each ward shall be elected by the electors of the city at large.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a finding that dilution of the minority vote does not exist may be premised on a conclusion that blacks could be successful at the polls if they worked harder than whites.

2. Whether the defendants in a voting rights case alleging dilution of the black vote prevail when the district court makes a finding of "ultimate fact" that dilution has been proved in accordance with the standards set out in White v. Regester, 412 U.S. 755 (1973), though not proved when considered under precedents of the court of appeals.

3. Whether the plaintiffs in a voting rights case brought under the fourteenth and fifteenth amendments alleging dilution

of minority voting strength must prove that the defendants or their predecessors had an intent to discriminate against blacks by means of the at-large system of voting.

4. If intent must be proved in such cases, did the court of appeals apply the proper standard of proof.

STATEMENT OF THE CASE

Fairfield is an industrial suburb of Birmingham, originally a planned community for the workers of Tennessee Coal and Iron Company (now part of the United States Steel Corporation). Of the city's 14,369 residents approximately 48% are black. The city is governed by a mayor and a thirteen-member city council, all of whom are elected at large. There are residence requirements for twelve of the council members: two must reside in each of six wards and are elected from numbered places, e.g., Ward 2, Place 1.

In 1968 black candidates won six of the 13 council positions, but in 1972 all blacks were defeated at the polls by a city-wide white majority despite their usually carrying their own wards. The petitioners (plaintiffs below), three

black Fairfield residents, brought suit alleging that the at-large election system diluted their voting strength in violation of the fourteenth and fifteenth amendments of the Constitution and 42 U.S.C. §§1981 and 1983. Jurisdiction was vested in the district court by 28 U.S.C. §§1343, 2201 and 2202.

On the trial of the case, the district court found that the at-large election system coupled with racially polarized voting "operate[s] to minimize or cancel the voting strength of the blacks in the City of Fairfield," Nevett A, 122a. The district court made explicit findings under each of the criteria set out in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd sub. nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), but found it necessary to return to the "basic standards" of White v. Regester, 412 U.S. 755 (1973). 122a.[1]

1. Both sides appealed; the defendants appealing the finding of dilution and the plaintiffs the remedy to be implemented.

The Nevett I court did not hold that this ultimate conclusion was incorrect,[1] but held it could not "affirm the ultimate conclusion of a dilution without findings of fact to fit proper standards" as enumerated in Zimmer v. McKeithen. Nevett I, 100-01a. It remanded for reconsideration of the findings of fact "according to the indicia of dilution stated in Zimmer and other cases," Nevett I, 102a.

On remand, the district court made new findings under the Zimmer criteria,[2] and concluded that the plaintiffs had not made out a case. The court then made a finding of "ultimate fact" that plaintiffs had established a case of dilution of black voting strength under White v. Regester, but that the court understood it was in error in failing to apply the Zimmer standards as "the determinants" of dilution. Nevett B, 63-4a.

1. In fact, the court of appeals held that the findings could not be set aside as clearly erroneous. Nevett I, 96a.

2. No additional evidence was taken. The Nevett I decision was on June 8, 1976 and Nevett B on June 11, 1978.

The Nevett II Court again found the findings of fact to be not clearly erroneous, Nevett II, 54a, but the court of appeals never addressed the difference the district court perceived between the White v. Regester criteria and the Zimmer factors. The second district court conclusion was affirmed.

Nevett II also held that racially discriminatory intent is a necessary element of proof of dilution. The court of appeals then held that proof of the Zimmer factors would satisfy the intent requirement which it believed Washington v. Davis, 426 U.S. 229 (1976), imposed.

The black/white population of Fairfield is nearly even. Until 1968, no blacks ever held elective office in the city. 106-07a. With the assistance of federal registrars, blacks achieved that year a 53 percent majority of registered voters, 108-09a, 122a, and elected six blacks to the thirteen member city council. All blacks were defeated at the polls in 1972. By the time of Nevett A, blacks were 48 percent of the registered voters. 122a.

> The [district] court attributed the marked disparity in these results [of the 1968 and 1972 elections] not to any invidious racial discrimination but rather to the failure of blacks to turn out a higher percentage in 1972.25
>
> 25. As the district court stated in its opinion on remand, "[t]he failure to elect any blacks to the thirteen member council in 1972 was not the result of past discrimination, but rather the consequence of (a) a failure to turn out a higher percentage of black voters than of white voters, (b) bloc voting, and (c) at-large voting for numbered places." Nevett II, 50a.

This finding of no discrimination was posited in a fact-finding that in order to win elections, blacks would have to turn out at a higher rate than whites.

In Nevett A, the district court found that the city council was "far more" responsive when blacks were on the council, 119a, "but there has not been a total lack of responsiveness merely because

there were no blacks on the city council." 120a. In Nevett B, that court said that while blacks "fared less well during an all-white city administration than under the laws of chance," 60a, unresponsiveness was not established because this must be a "condition or quality of being unresponsive, and is not established by isolated acts of being unresponsive." 60a. The "isolated acts" included, inter alia, one to three blacks out of sixty employed among civil service, fire and police positions, 118a, no blacks appointed to boards or agencies until 1964, 106a, and then only one board (relating to the financing of a predominantly black college) with a black majority, 117a. The district court found "some conscious characterization by city officials to the effect that boards would not become majority dominated by blacks, but only minority." 117a. These findings on responsiveness were affirmed.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS OPINIONS HERE DEPARTED FROM WHITE V. REGESTER, 412 U.S. 755 (1973), AND OTHER HOLDINGS OF THIS COURT.

A. Fifth Circuit precedent since White v. Regester.

This Court has dealt with the constitutionality of multi-member district systems only twice where race was a relevant factor in the Court's decision: Whitcomb v. Chavis, 403 U.S. 124 (1971), and White v. Regester, 412 U.S. 755 (1973).

White affirmed a finding of dilution on findings of fact by the district court that included past official discrimination touching the franchise, education, employment, economics, health, politics, etc., majority vote and "place" statutes, failure to elect blacks, slating, lack of need for black electoral support, unresponsiveness, and racial campaigns. 412 U.S. at 766-68. The fifth circuit has distilled its own touchstone formula, Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973)(en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976)(per curiam).

Zimmer identified four major factors to be considered by district courts as contributing to the existence of racial dilution:

(a) lack of minority access to the process of slating candidates;[1]

(b) unresponsiveness of legislators to the particularized interests of the minority;

(c) a tenuous state policy underlying the preference for multi-member districting;[2] and

(d) the existence of past discrimination which precludes effective participation in the election system.

If these factors are proven,

> a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical sub-districts.
> 485 F.2d at 1305.

The court of appeals noted that the aggregate of these factors establishes the case. The court did not say how much proof is needed to prevail. This test has been utilized numerous times by the fifth circuit to test the correctness of the analysis (but not the result) of district court opinions.[1]

A later en banc decision marks the next significant reconsideration of this question by the court of appeals: Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.)(en banc), cert. denied, 434 U.S. 968 (1977). In Kirksey, the court restated the factors or issues to be considered in different language than in Zimmer, and held for the first time that similar factors, not just the ones stated

1. In Turner v. McKeithen, 490 F.2d 191, 194 (5th Cir. 1973), the fifth circuit made clear that this factor also includes "the opportunity for the minority group to participate in the candidate selection process" and election.

2. The court held that the state policy must be "divorced from the maintenance of racial discrimination." 485 F.2d at 1305.

1. Hendrix v. Joseph, 559 F.2d 1265 (5th Cir. 1977); David v. Garrison, 553 F.2d 923 (5th Cir. 1977); Paige v. Gray, 538 F.2d 1108 (5th Cir. 1976); McGill v. Gadsden County Commission, 535 F.2d 277 (5th Cir. 1976); Gilbert v. Sterrett, 509 F.2d 1389 (5th Cir. 1975): Bradas v. Rapides Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975); Robinson v. Commissioners Court, 505 F.2d 674 (5th Cir. 1974); Moore v. Leflore County Board of Election Commissioners, 502 F.2d 621 (5th Cir. 1974); Turner v. McKeithen, 490 F.2d 191 (5th Cir. 1973).

in Zimmer, could be used, but retained the "aggregation" language. 554 F.2d at 143. The Kirksey court also utilized a prima facie case concept, at least for the issue of past discrimination precluding effective participation in the political process. The court held that

> Once plaintiffs established a past record of racial discrimination and official unresponsiveness . . ., it then fell to the defendants to come forward with evidence that . . . there was presently equality of access.
> 554 F.2d at 144-5.

Finally, the court considered the effect of Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), on the holding in White v. Regester, supra, and concluded

> the Dallas and Bexar County plaintiffs in White v. Regester were successful, even though they did not prove the plan in question was a Gomillion v. Lightfoot [364 U.S. 339 (1960)] type of racial gerrymander, because they established the requisite intent or purpose in the form of the existent denial of access to the political process.
> 554 F.2d at 148.

Because intent is shown by present denial of access, which in turn is proven by an unrebutted record of past discrimination, including unresponsiveness, the next step was to hold that proof of intent was required, which is what Nevett II did. 24-5a.

B. The Court of Appeals Failed to Apply the Law of Burden Shifting as Required by Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), and Previous Elections Decisions.

While at-large election schemes are not per se unconstitutional they can easily be utilized to dilute the voting strength of minorities. Racially polarized voting, though unfortunate, United Jewish Organizations v. Carey, 430 U.S. 144 (1977), is often a reality, Most black elected officials are elected from majority black districts.

White v. Regester, 412 U.S. 755 (1972), and Whitcomb v. Chavis, 403 U.S. 124 (1971), indicate that the order of proof in challenging an at-large system is that plaintiffs need to show:

1. racially polarized voting that, combined with the at-large system, operates to deprive the minority of the seats it could be expected to win with single-member districts.

2. That blacks have had less opportunity than did other residents to participate in the political process.

These are key elements necessary to find the ultimate issue of unconstitutional dilution of the franchise. Lack of access to the political process can be proved by the whole panoply of factors (and others) as listed in White. Bloc voting and failure at the polls are obviously relevant to lack of access. If intent is required, then it can be shown by proof of the above, for when it becomes apparent that the election machinery has the discriminatory impact, the choice of electoral scheme abets the impact in a knowing manner. It can be particularly established by proof of past discriminatory conduct the effect of which has not abated, Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.)(en banc), cert. denied, 434 U.S. 968 (1977).[1]

1. Of course, factor one plus intent would alone prove unconstitutional dilution.

With this, a prima facie case of discrimination is established. The burden should shift to the defendants to show by a preponderance of the evidence, Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287 (1977), that either plaintiff's evidence is wrong or outweighed, or that the past denial of access to the political process has been dissipated. Kirksey, supra, at 144-45. See also, Gaffney v. Cummings, 412 U.S. 735, 745 (1973).

The "aggregate of factors" test developed in Zimmer and applied in Nevett II simply does not follow the burden of proof procedure compelled by this Court. It does not compel the district court to decide, initially, whether a prima facie case has been made out. Thus the evidence of non-dilution, etc., is never weighed by the preponderance of evidence test, with the burden resting upon the defendants. The aggregate test compels the weighing of factors, some of which work in favor of defendants in a particular case, when the presumption is still in favor of

defendants.[1]

In sum, no matter how strong the prima facie evidence of dilution presented, the court of appeals never weighs the totality of the evidence of the defense by the preponderance of the evidence test. This works to the detriment of the challenging parties, and merits review by this Court.

1. A prime example is proof of slating. Because it existed in White v. Regester, the court of appeals always mentions this as one factor. Overt slating as in White v. Regester seldom exists, but the court of appeals compels the consideration of its non-existence as a positive element of non-dilution. If it once existed but was voluntarily removed, it would be evidence of lack of intent, and if it does exist it would be denial of access evidence. But if slating never existed it should have no weight.

Petitioners do not assert that plaintiffs' evidence cannot be the basis for inferences drawn against them, Wright v. Rockefeller, 376 U.S. 52, 57 (1964), but that it is evidentiarily inaccurate to use absence of a factor, which has no relevance to the jurisdiction, as a basis for such inferences.

C. The Court of Appeals Failed to Apply the Strict Scrutiny Test to the Evidence as Required by This Court.

Where the right to the elective franchise is involved,[1] or where there is proof of racial discrimination,[2] the courts are to apply careful judicial scrutiny to the evidence. In measuring deviations in districting cases, both the "character as well as degree of deviation" are subject to careful judicial scrutiny. Reynolds v. Sims, 377 U.S. 533, 581 (1964)(emphasis added).[3] The court of appeals test at

1. Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969).

2. In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977), this Court said that "[w]hen there is proof that a discriminatory purpose has been a motivating factor," then at that point judicial deference to other state policies is no longer justified. If strict scrutiny in non-fundamental rights matters is not to be applied until a prima facie case of discrimination is found, then it is all the more important, as argued in section I.B above, that this determination be made.

3. Indeed, any rationale supporting such deviations must be "free from any taint of arbitrariness or discrimination." Mahan v. Howell, 410

(Footnote continued on next page)

issue here does not apply such scrutiny, though there is nothing in White v. Regester, 412 U.S. 755 (1973) or Whitcomb v. Chavis, 403 U.S. 124 (1971), to indicate that a lower standard of review should be applied.

Petitioners do not contest that the basic fact findings, e.g., whether there are numbered post requirements, are to be reviewed by the clearly erroneous rule. But when the district court is to determine by the aggregate of the factors whether both denial of access to the political process and intent to discriminate exist, the rule does not shield these as findings of fact. Proof of intent "demands a sensitive inquiry into such circumstantial and direct evidence as may be available," Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977), not only by the district court but also by any reviewing court. Additionally, the ultimate conclusion as to whether or not unconstitutional dilution exists is

(Footnote continued from preceding page)
U.S. 315, 325 (1973) quoting Roman v. Sincock, 377 U.S. 695, 710 (1964). Where racial dilution is claimed on an at-large election system with a substantial minority population, such a plan would seldom be totally free of such taint. Cf. United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

not subject to the clearly erroneous rule. See, Neil v. Biggers, 409 U.S. 188, 193 n. 3 (1972); the ultimate conclusion here must be subjected to strict scrutiny. The court of appeals here limited its review to the clearly erroneous rule.

The standard of review applied by the court of appeals affirmed a finding of "responsiveness" on a definition that required this factor be proved as "a total lack of responsiveness," supra, 9, and that black voters were not diluted because they could win elections if black voters turned out at a rate higher than whites, supra, 9. These findings contravene White v. Regester and would not withstand careful judicial scrutiny. The court of appeals departure from White v. Regester and other decisions of this Court merits full review.

II. REVIEW SHOULD BE GRANTED TO DECIDE THE NECESSITY AND NATURE OF PROOF OF INTENT IN CASES ALLEGING DILUTION OF A RACIAL GROUP'S VOTES.

A. Wright v. Rockefeller, 376 U.S. 52 (1964) does not require proof of intent.

The court of appeals relied upon the citation by this Court of Wright v. Rockefeller, 376 U.S. 52 (1964), in both Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252 (1977), for the conclusion that this Court considered intent to be a requirement in election cases.[1] Wright does not compel such a conclusion.

The Wright plaintiffs claimed that four Manhattan congressional districts had been racially gerrymandered because one was 86.3% black and Puerto Rican and the others had less than 25% non-whites. Because the relief sought would probably have been four white-dominated districts, it is nor surprising that a Negro Congressman intervened as a defendant. 376 U.S. at 53. Plaintiffs' only claim was an intent to segregate and they failed to prove their case.

1. Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.)(en banc), cert. denied, 434 U.S. 968 (1977), did not expressly decide the issue. Assuming intent was required, it found intent. 554 F.2d at 147-48.

While citation of Wright in Davis and Arlington Heights may lend credence to the broad conclusion that intent must be shown, such a conclusion must also assume that this Court omitted the element of intent when it wrote in White v. Regester, 412 U.S. 755, 766 (1973):

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political process and elect legislators of their choice.

It is petitioners' position that the element of intent was not inadvertently omitted in White v. Regester. But if they are in error, this issue merits plenary consideration by this Court.

B. Racial dilution of the elective franchise in at-large districts is not sui generis, apart from other elective franchise issues.

The court of appeals held that dilution cases speak to the quality of representation while Reynolds v. Sims, 377 U.S. 533 (1964), and other malapportionment

cases are quantitative and therefore do not require proof of intent. Nevett II, 11a. Reynolds, as well as Whitcomb, concerns the dilution of the franchise. "Debasing" and "diluting" are impermissible, 377 U.S. at 567, whether by districts of unequal size or by submerging votes.

> Simply stated, an individual's right to vote . . .is unconstitutionally impaired when its weight is in a substantial fashion diluted. . . Reynolds v. Sims, supra, 377 U.S. at 568.

The court of appeals stated that, in single-member district cases, mathematical comparisons are the issue and "no showing of discrimination along racial, ethnic, or political lines need be shown." Nevett II, 11a. The plaintiffs' burden in all fourteenth amendment cases, under precedents of this Court, is to make out a "prima facie case of invidious discrimination." Gaffney v. Cummings, 412

U.S. 735, 745 (1973). In single-member district challenges, invidious discrimination can be shown solely by population variances.

> It is clear, however, that at some point or level in size, population variances do import invidious devaluation of the individual's vote and represent a failure to accord him fair and effective representation. (Emphasis original.) White v. Weiser, 412 U.S. 783, 792-93 (1973).

Variations may be so small as not to be prima facie evidence of discrimination. Gaffney v. Cummings, supra. If large enough, the burden of proof then shifts to the defendants, and they may be able to justify the variations. Mahan v. Howell, 410 U.S. 315 (1973). Plaintiffs have no burden of showing lack of good faith or intent to discriminate--they need show only the effect, an effect which imports invidious discrimination.

There is no apparent reason for changing the rules of proof for multi-district submergence cases as the court of appeals held. If plaintiffs show that the effect of an at-large system is submergence of the black minority

vote, they have made out a prima facie case of invidious discrimination and the burden of proof should shift to defendants to justify their electoral scheme.

This Court should also consider the holding of Nevett II that intent is an element of proof required under the fifteenth amendment. This narrow amendment[1] concerns race and the elective franchise, "a fundamental political right. . .preservative of all rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964).

C. The elective franchise involves a fundamental right, subject to strict scrutiny. If intent to discriminate must be shown, it can be found in the structure of the electoral scheme.

> [T]he right to exercise the franchise in a free and unimpaired manner is preservative of all other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.
> Reynolds v. Sims, 377 U.S. 533, 562 (1964).

1. Compare, Washington v. Davis, 426 U.S. 229, 248 (1976).

This case is illustrative of the confusion of the courts subsequent to White v. Regester, 412 U.S. 755 (1973). The first time around, the district court felt there was no need to prove intent. 114a. Nevett I did not dispel this belief. Intent was joined as an issue only on the second appeal.[1]

If intent is a necessary element, it need not be that purposefulness found necessary in Screws v. United States, 325 U.S. 91 (1945). The state of mind of the defendants is not a consideration, Hernandez v. Texas, 347 U.S. 475, 482 (1954) ("The result bespeaks discrimination, whether or not it was a conscious decision. . .").[2]

1. If intent is necessary, petitioners strenuously urge review by this Court to define what is needed for this element, in order to assist both litigants and triers of fact.

2. This is not to say that a defendant's testimony as to purpose would be entitled to no weight. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977).

Like jury discrimination cases, once disproportionate results and opportunity to discriminate is shown, the necessary intent to discriminate is inferred and a prima facie case of discrimination is established. E.g., Alexander v. Louisiana, 405 U.S. 625 (1972). Public officials are deemed to be aware of the unrepresentativeness of jury lists, as they must be deemed to be aware of their own unresponsiveness to minority interests and racial bloc voting. This rule is efficacious in such cases because there can be few reasons for the results.[1] Likewise in election cases there are a limited number of reasons for a particular electoral scheme. In both it is open to defendants to explain the reasons in rebuttal. Alexander v. Louisiana, 405 U.S. 625, 632 (1972). Review should be granted to settle these important issues in this fundamental area of law.

1. In comparison, there are many good reasons why a teacher is dismissed or a zoning change not made. It is less easy to perceive the intent of the public officials in such cases.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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